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In the Supreme Court of the United States

OCTOBER TERM, 1982

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When the United States Environmental Protection Agency disapproves an integral portion of a regulation submitted by the State as a revision to its State Implementation Plan under the Clean Air Act, is the remaining portion of the regulation enforceable by the Agency if it is neither:

(1) Adopted by the State as a state regulation; nor

(2) Promulgated as a federal regulation pursuant to the provisions of the Act?

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANNE M. GORSUCH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the case of *Public Service Company of Indiana, Inc., Plaintiff-Appellant, v. United States Environmental Protection Agency and Douglas M. Costle, Defendants-Appellees,* No. 81-1241.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 682 F.2d 626, and is set forth in the Appendix to this Petition ("Appendix") at A–3. The opinion of the District Court is reported at 509 F. Supp. 720, and is set forth in the Appendix at A–37.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered June 25, 1982. (A–51). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c) (1976).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutes and regulations, the pertinent texts of which are set forth in the Appendix:

1. The Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. IV 1980); pertinent portions set forth in Appendix are 42 U.S.C. §§ 7401 (A–52), 7410 (A–52), and 7413 (A–68) (Supp. IV 1980) and 42 U.S.C. § 1857h–5 (1976). (A–90).

2. Indiana air pollution control regulation, APC–3, "Smoke and Other Visible Emissions," *1969 Additions and Revisions to Rules and Regulations (Indiana)* (1969 ed.) 4, 11 (referred to herein as "1972 APC–3"). (A–93).

3. Indiana air pollution control regulation, APC–3, "Visible Emissions and Malfunctions," 325 IND. ADMIN. CODE 1-3 (1979)(referred to herein as "1974 APC–3"). (A–94).

4. 40 C.F.R. § 52.776(c) (1981). (A–93).

STATEMENT OF THE CASE

Petitioner Public Service Company of Indiana ("PSI") is a regulated public utility engaged in the generation, transmission, distribution and sale of electric energy. The respondents are the United States Environmental Protection Agency and its Administrator Anne M. Gorsuch[1] (collectively, "EPA", "Agency" or "Administrator").

Approval of Indiana's State Implementation Plan.

In January 1972, Indiana submitted to EPA under the Clean Air Act (the "Act"), 42 U.S.C. §§ 7401-7626 (Supp. IV 1980), a State Implementation Plan ("SIP") to meet national air quality standards within the borders of Indiana. The SIP included, *inter alia*, an Indiana air pollution control regulation called "APC–3" ("1972 APC–3") which limited to 40% opacity the "smoke" from "any combustion installation." *1969 Additions and Revisions to Rules and Regulations (Indiana)* 11 (A–94). 1972 APC–3 was approved by EPA as part of Indiana's SIP on May 31, 1972, 37 Fed. Reg. 10,863-65 (1972) (A–116-122), and thereby became federally enforceable under Sections 110(d) and 113 of the Act. 42 U.S.C. §§ 7410(d), 7413 (Supp. IV 1980).

Proposed Revision of Indiana's SIP.

During 1974, the Indiana Air Pollution Control Board promulgated a number of regulations, including a new regulation designated APC–3 ("1974 APC–3"). 325 IND. ADMIN. CODE 1-3 (1979) (A–94). On November 8, 1974, 1974 APC–3 was submitted to EPA for approval under Section 110(a)(3)(A) of the Act, 42 U.S.C. § 7410(a)(3)(A) (Supp. IV 1980), as a revision of Indiana's SIP. 40 C.F.R. § 52.770(c)(14) (1981); 40 Fed. Reg. 19,210 (1975) (A–153-4). In promulgating 1974 APC–3 and submitting it for approval as a revision, the State was not

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[1] Pursuant to Rule 40.3 of this Court, Anne M. Gorsuch is substituted for Douglas M. Costle, former Administrator of the United States Environmental Protection Agency, who was a party in the case before the Court of Appeals.

acting in response to any finding and notification by EPA pursuant to 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (Supp. IV 1980), that 1972 APC–3 was inadequate to achieve national air quality standards or was otherwise not in compliance with the Act.

As stated by EPA in its public notice of receipt of the proposed revisions, 1974 APC–3 amended 1972 APC–3 "in its entirety." 40 Fed. Reg. 19,210 (1975) (A–154). In particular, Section 1 of 1974 APC–3 substantially expanded the coverage of 1972 APC–3 to "other visible emissions" in addition to "smoke" and to "any equipment" rather than just "any combustion installation." The same sentence of Section 1 of 1974 APC–3 that expanded its coverage also, unlike 1972 APC–3, limited the application of the opacity restrictions to those emissions occurring "for more than a cumulative total of fifteen minutes in a 24-hour period."[2]

EPA announced its decision on 1974 APC–3 by order dated October 21, 1975, and published October 28, 1975:

> APC–3 of Indiana's Air Pollution Control Regulations (visible emission limitation) is disapproved insofar as the phrase "for more than a cumulative total of 15 minutes in a 24-hour period" will interfere with attainment and maintenance of particulate standards.

40 Fed. Reg. 50,033 (1975) (A–165) (subsequently codified at 40 C.F.R. § 52.776(c) (1981) (A–93). As interpreted by EPA and the Court of Appeals, that order had the effect of approving and making legally enforceable 1974 APC–3's expansion of coverage to all "visible emissions" rather than just "smoke" and "any equipment" rather than just "any combustion installation" while, at the same time, disapproving and deleting that portion of 1974 APC–3 which permitted such emissions for up

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[2] "Sec. 1. Limitation. No person shall operate any equipment so as to produce, cause, suffer, or allow smoke or other visible emissions in excess of 40 per-cent opacity . . . for more than a cumulative total of fifteen minutes in a 24-hour period . . . ." 325 IND. ADMIN. CODE § 1-3-1 (1979) (A–95).

to 15 minutes per day. *Public Service Company of Indiana, Inc.* v. *EPA*, 682 F.2d 626, 638 (7th Cir. 1982) (A–26).[3]

EPA's resulting more stringent regulation, restricting all emissions in excess of 40% opacity, was never the subject of public hearings, either by Indiana or EPA. Before its October 21, 1975 order, EPA published no notice of intent to adopt, by selectively disapproving the fifteen-minute limitation or otherwise, a more stringent regulation than Indiana had submitted for approval. See 40 Fed. Reg. 19,210-11 (1975) (A–153-159). EPA never subsequently promulgated the resulting regulation as a federal regulation pursuant to Section 110(c)(1) of the Act. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980). Indiana never subsequently adopted EPA's version of 1974 APC–3 as a state regulation and has not enforced EPA's version. *See, e.g.*, 44 Fed. Reg. 2402-03 (1979) (A–166-7); 44 Fed. Reg. 12,461-62 (1979) (A–169-170); and 46 Fed. Reg. 21,790-91 (1981) (A–240-242). The State has twice sought EPA approval of new revisions addressed to the concerns reflected by the disapproved 15-minute exception in 1974 APC–3, but its efforts have been unsuccessful to date. (A–98; A–112).[4]

Enforcement Against PSI.

On January 7, 1980, after having been denied permission to inspect certain PSI facilities, EPA successfully applied *ex*

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[3] Since EPA's October 21, 1975 order does not state anywhere that any portion of 1974 APC–3 was "approved," the actual intent of the order is by no means clear and PSI challenged this interpretation in the courts below. However, PSI is not seeking review of that question in this Petition.

[4] On June 26, 1979, Indiana submitted a revised version of APC–3 to EPA for approval as a revision to Indiana's SIP. 325 IND. ADMIN. CODE 1-3.1 (1980 Supp.) (A–98). On March 27, 1980, EPA published notice of its intent to disapprove that proposed revision. 45 Fed. Reg. 20,432, 36-38 (1980) (A–178, 195-200). Thereafter, on October 6, 1980, Indiana submitted another proposed revision to APC–3. 325 IND. ADMIN. CODE 5 (1982 Cum. Supp.) (A–112). Although EPA has not taken final action on that submission, it published notice of its intent to disapprove on March 3, 1982. 47 Fed. Reg. 9020-21 (1982) (A–244, 251-52).

parte to a United States Magistrate for warrants authorizing inspection of those facilities. The applications were supported by affidavits of an EPA inspector stating, *inter alia*, that he believed the PSI facilities were being operated in violation of 1974 APC–3, as approved in part by EPA in October, 1975.[5] The warrants were executed and the Magistrate denied motions to quash. On March 21, 1980, EPA notified PSI that it had found PSI in violation of EPA's version of 1974 APC–3.

The Action Below.

On April 7, 1980, PSI brought this action against EPA in the District Court for the Southern District of Indiana, asserting jurisdiction under 28 U.S.C. §§ 1331(a), 2201 (Supp. III 1979), and 5 U.S.C. § 702 (1976). The suit sought, *inter alia*, a declaratory judgment that 1974 APC–3 was not federally enforceable because it was not approved in its entirety by EPA, as required by the Act.[6] PSI also requested injunctive relief against further inspections and against use of any evidence obtained by means of the warrants.

After a hearing on PSI's motion for preliminary injunction, which the parties later agreed to treat as a trial on the merits, the District Court entered final judgment for EPA on PSI's claims.[7] In particular, the District Court held that EPA had lawfully approved 1974 APC–3 "with the minute exception of the 15-minute exemption provision . . . ." *Public Service Company of Indiana, Inc.* v. *EPA*, 590 F.Supp 720, 724 (S.D. Ind. 1981) (A–46).

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[5] The District Court concluded and the Seventh Circuit affirmed that probable cause was established on the basis of alleged violations of "1974 APC–3 . . . with the 15-minute exemption excised." 682 F.2d at 638 (A–26).

[6] PSI also challenged the scope of the warrants, but is not seeking review of those questions in this Petition.

[7] The Seventh Circuit characterized the ruling as a "summary judgment for the defendants (EPA)." 682 F.2d at 628 (A–5). Although EPA moved for summary judgment, the District Court's memorandum opinion correctly states that it is based on "a hearing on the merits . . . ." 590 F.Supp at 721 (A–41).

The Court of Appeals for the Seventh Circuit affirmed the District Court in all respects. With respect to PSI's claim that 1974 APC–3 was not enforceable because it was not approved in its entirety by EPA, the appellate court upheld EPA's argument that the Act authorizes EPA to approve and enforce "any portion of a state submitted (SIP) revision" 682 F.2d at 632 (A–13), and, applying that conclusion to the facts of this case, held that "EPA partially approved the 1974 APC–3, disapproving only the 15 minute exemption." *Id.* at 636 (A–22).

REASONS FOR GRANTING THE WRIT

In upholding EPA's claim of statutory authority selectively to approve and enforce the restrictive portions of regulations submitted by the State while simultaneously disapproving and deleting the State's limitations on those same restrictions, the Seventh Circuit has destroyed the balance Congress struck between state and federal regulation of the environment. Since EPA's claimed authority is not conferred on the face of the Act, and its exercise alters the balance struck by the Act's most central features, the Seventh Circuit incorrectly decided a question of national significance.[8]

As this Court has twice determined, Congress intended the Act to give to each state, and not to EPA, the authority to choose its own "mix" of limitations, provided only that the mix chosen is sufficient to achieve minimum national air quality standards. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79, 86-87 (1975); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 267, 269 (1976). Further, as this Court has also determined, each state and not EPA is given "continuing

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[8] In *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994, 997-998 (7th Cir. 1980), the court did not reach appellant's contention that EPA "has no statutory authority to issue 'partial' approvals of state revisions of its SIP...." The validity of the EPA's "partial approval" technique was probably raised by the facts in *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16, 18 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), but was not argued to or addressed by the court.

authority to revise [prior] choices about the mix," again provided only that the revised mix is sufficient to achieve minimum national standards. *Train*, 421 U.S.at 87, 98. The mere existence of the authority claimed and upheld by the Court of Appeals' decision significantly impairs the states' "continuing authority" to revise prior policy choices. Further, where, as here, EPA elects to exercise that authority, it will to that same extent implement and enforce *its* policy choice as to the proper mix rather than the state's, in defiance of the Act's fundamental policy. Finally, in circumstances unlike those here, where due to state default EPA *is* authorized to propose federal regulations as ingredients of the overall mix, the Seventh Circuit's decision allows EPA to negate both the state's second opportunity to select means of its own, and the public hearing and rulemaking procedures mandated by the Act.

I. The Act Gives The States Discretion To Choose Any Mix Of Regulations Adequate To Meet National Air Standards And Expressly Provides The Procedures EPA Must Follow If The State Fails To Comply.

The general design of the Act was described by this Court in *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60. Under Section 110(a)(1) of the Act, each state is directed to submit to EPA for approval a plan designed to meet national air quality standards within that state's boundaries. 42 U.S.C. § 7410(a)(1) (Supp. IV 1980). That plan must have been "adopted after reasonable notice and hearing" by the state, 42 U.S.C. § 7410(a)(2) (Supp. IV 1980), and must include rules and regulations enforceable by the appropriate state agency. 42 U.S.C. § 7410(a)(2)(D) and (F) (Supp. IV 1980); 40 C.F.R. §§ 51.11, 51.22 (1981).

EPA *must* approve *any* plan the state submits that is adequate to achieve and maintain national air standards and complies with the other general requirements of Section 110(a)(2). 42 U.S.C. § 7410(a)(2) (Supp. IV 1980); *Train*, 421 U.S. at 79. If EPA approves a plan submitted by a state, that plan becomes an "applicable implementation plan," 42 U.S.C. § 7410(d) (Supp. IV 1980), and federally enforceable under Section 113 of the Act. 42 U.S.C. § 7413 (Supp. IV 1980). EPA

has no authority to require that a state plan do more than achieve minimum national standards or to alter any mix of limitations selected by the state which is sufficient to meet that goal. *Train*, 421 U.S. at 79.

If EPA disapproves a plan or a portion thereof submitted by a state, the Administrator has a mandatory duty under Section 110(c)(1) of the Act to "promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof" for that state. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980). Even in that event, however, the state is given an additional six months to submit an acceptable alternative. *Id.* If the state fails, EPA must hold public hearings in the affected state before promulgating the Agency's proposed regulations. *Id.* Upon promulgation, such regulations become part of the state's federally enforceable implementation plan, along with any previously approved state regulations. 42 U.S.C. §§ 7410(d), 7413 (Supp. IV 1980).

After a SIP has been approved (or promulgated) by EPA, a state may propose revisions to its own plan in either of two situations: (1) where the state voluntarily elects to alter its previously chosen mix, *see Train*, 421 U.S. at 80, 87; or (2) where EPA has found and notified the state that its SIP is or has become inadequate to meet minimum national standards or otherwise fails to comply with the Act. 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (Supp. IV 1980). Such revisions must be adopted after notice and hearing in the state, 42 U.S.C. § 7410(a)(3)(A) (Supp. IV 1980), and EPA must approve any such revisions meeting the requirements of the Act. 42 U.S.C. § 7410(a)(2) (Supp. IV 1980); *Train*, 421 U.S. at 80. As this Court emphasized, the Act's "revision section is . . . the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards." *Id.*

In sum, the Act provides only two methods of adopting federally enforceable emissions limitations: (1) EPA may approve valid regulations promulgated by the state; and (2) EPA may promulgate its own regulations by following the

procedures in Section 110(c)(1). The first is the preferred method; the second may be employed only if the state defaults.

This case presents the question whether the Act was properly construed to allow a third method—whether EPA may blue-pencil integral portions of a state-submitted regulation and enforce the remainder absent either adoption of EPA's version by the state or formal promulgation of EPA's version as a federal regulation pursuant to Section 110(c)(1), and, in particular, whether EPA may do so when the regulation so edited was submitted by the state to revise a valid pre-existing state regulation never found by the Administrator to be inadequate under the Act.

II. Where A State Submits A Regulation As A Revision To A Valid Pre-existing State Regulation, Permitting EPA To Disapprove An Integral Portion While "Approving" And Federally Enforcing The Remainder Serves No Statutory Policy And Seriously Erodes The State's Primary Authority Under The Act.

Indiana's 1974 action in seeking revision of APC–3 was a paradigmatic exercise of the State's "continuing authority to revise choices about the mix of emissions limitations." *Train*, 421 U.S. at 87. On the one hand, the State's version of 1974 APC–3 expanded the coverage of its restrictions to include all visible emissions (having previously been limited to "smoke") and all equipment (having previously been limited to "combustion installations"). On the other hand, Indiana contracted the coverage of its restrictions by granting a 15-minute-per-day exception to both emissions previously covered and those brought within coverage by the same revision.[9]

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[9] Section 1 of 1974 APC–3 is denominated as a "Limitation on emissions", 325 IND. ADMIN. CODE 1-3-1 (1979), and is referred to as such throughout this Petition. Technically, however, it and other opacity limits are properly considered surveillance techniques for detecting violations of actual "emission limitation[s]" as defined by

(Footnote continued on next page)

EPA disapproved the 15-minute exception for emissions previously and newly covered because the State "failed to . . . demonstrat[e]" that the exception "would not result in an interference with attainment and maintenance of the [pertinent] standards." 40 Fed.Reg. 50,033 (1975). Petitioner does not contest that determination. What petitioner does contest is EPA's exercise of claimed authority simultaneously to adopt by selective "approval" and to eliminate by selective "disapproval" portions of the same regulation, thereby expanding the coverage of the resulting regulation beyond the scope of both 1972 APC–3 and 1974 APC–3. The result, of course, is to adopt and enforce EPA's policy choice of a proper mix of emissions limitations, not that of the State of Indiana.

Indiana's version of 1974 APC–3 demonstrates that the State considered the 15-minute exception an integral and substantive part of its decision to revise the "mix" of emissions limitations it had chosen in 1972. If there could be any doubt, it is dispelled by Indiana's subsequent treatment of EPA's edited version of 1974 APC–3. The State has never adopted EPA's version of what EPA says is (and what the Act says must be) the *State's* regulation; the State has refused to enforce it; and the State has twice sought to revise APC–3 since EPA is federally enforcing its version of 1974 APC–3 against Indiana emissions sources. *Supra* at p.5 and n.4.[10]

Section 302(k) of the Act, 42 U.S.C. § 7602(k) (Supp. IV 1980). *See*, 40 C.F.R. § 51.19(c) (1981). Surveillance techniques are required to achieve an adequate SIP, *see id.*, and are frequently more important as a practical matter than "emissions limitations" narrowly defined. They clearly are governed by those provisions of the Act giving the states continuing authority to revise their SIPs, and this Court's analysis in *Train*.

[10] EPA cannot contend (and notably has not contended to date) that the State is required to promulgate and enforce as a State regulation EPA's federal version of Indiana 1974 APC–3. Such a contention would assert that the Agency may via an alternative route enforce against the states an authority EPA conceded it did not have in *EPA* v. *Brown*, 431 U.S. 99 (1977).

In part, the Court of Appeals rejected PSI's argument that EPA may not "partially approve" and enforce 1974 APC–3 because, in that court's view:

> To require the Administrator to disapprove an entire regulation because one provision in it is inconsistent with the requirements of 42 U.S.C. § 7410(a)(2) would unnecessarily curtail the discretion of the states in formulating their SIPs.

682 F.2d at 633 (A–15). But that rationale ignores that under the Act states are always given an opportunity to correct a deficient SIP before federal regulations may be promulgated pursuant to Section 110(c)(1). 42 U.S.C. § 7410(c)(1)(Supp. IV 1980). And it makes no sense at all when, as here, the State voluntarily submitted the regulation *as a revision of a pre-existing state regulation previously approved by EPA and never subsequently found by the Agency to be inadequate under the Act* pursuant to Sections 110(a)(2)(H) and 110(c)(1)(C). 42 U.S.C. §§ 7410(a)(2)(H), 7410(c)(1)(C) (Supp. IV 1980). In that case particularly, the Administrator's authority is and must be limited to approving or disapproving the proposed revision in its entirety if the continuing policy role Congress gave the states is to be preserved.

Denying EPA authority to approve and enforce a portion of a regulation submitted by the state as a revision to a valid pre-existing regulation leaves the states with the primary policy role with respect to the limitations mix. It leaves the states, and not EPA, with the choice whether to:

(1) Continue with the pre-existing regulation;

(2) Develop and submit for approval some new alternative; or

(3) Adopt EPA's version of a minimally adequate new one.

That is the result that Congress intended and this Court affirmed. 42 U.S.C. §§ 7401(a)(3), 7407(a) (Supp. IV 1980); *Train*, 421 U.S. at 79; *Union Electric*, 427 U.S. at 266.

On the other hand, no purpose of the Act is served in allowing the Administrator to exercise the authority claimed

here. While the state is considering which option to choose, the pre-existing SIP, previously approved by the Administrator and never subsequently found to be inadequate, remains in effect. And, of course, consistent with the policy of the Act, that pre-existing SIP has the virtue of having been chosen by the state.

The authority to edit state submitted revisions and to enforce the remaining portions, claimed by EPA and affirmed by the Court of Appeals, erodes the state's primary and continuing policy role under the Act. Knowledge that EPA may blue-pencil a revised policy choice in unrestricted and unpredictable ways, and federally enforce a regulation less acceptable to the state than the choice sought to be revised, will render all states considerably more reluctant to exercise the continuing responsibility and discretion Congress conferred. And where, as here, EPA elects to exercise that claimed authority, it implements and enforces *its* policy choice as to an appropriate mix of emissions for the state, ousting the state from the primary policy role Congress intended it to have.[11]

To countenance that claim of authority, as the decision of the Court of Appeals does, inevitably countenances precisely those administrative results which occurred in this case. EPA "approves" those portions of the revised regulation it likes, and which substantially expand the scope of the regulation, while it simultaneously disapproves and deletes concomi-

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[11] Sanctioning EPA's claim of authority, as exercised in this case, will result both in anamolies never intended by Congress and in the states' reluctance to submit revisions. For example, if a regulation submitted by a state provides that the restrictions it contains apply only to certain industries, EPA could, by employing the blue-pencil authority challenged here, delete that portion and thereby enact a regulation applicable to all industries. Similarly, the Agency could, by using its blue-pencil technique, have deleted the "0" in Indiana's 1974 APC–3 providing a 40% opacity limitation. Plainly Congress did not intend for the states to be subjected to this kind of unfettered authority on the part of EPA.

tant relaxations of restrictions viewed by the state as an integral part of its revised choice.[12]

This result fundamentally alters the Act and transfers to EPA powers heretofore both the Congress and this Court thought were reserved to the states. This Court should review the Court of Appeals decision in light of EPA's unwarranted usurpation of the states' role in determining the appropriate emissions mix, and the nationwide effects that flow from its judicial blessing.

III. EPA Has No Statutory Authority In Any Circumstance To Create And Enforce New Regulations Merely By "Partially Disapproving" Those Submitted By The State.

The further implications of the authority claimed and upheld below for the proper operation of the Act also justify review of the Court of Appeals' decision by this Court. Indiana has never adopted EPA's version of 1974 APC-3 and that version is quite clearly not operative as a matter of Indiana law.[13] Consequently, two different regulations are in effect in Indiana, one state and one federal, a result that Congress neither contemplated nor intended. Further, by proceeding as it has, EPA has deprived affected industries,

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[12] If EPA excises portions of a state submitted revision and "approves" the remainder, it is theoretically true that the state may subsequently seek EPA approval of the pre-existing regulation as a"revision" of EPA's version of the new regulation. But that places an extensive procedural burden on the state that is both unnecessary and unwarranted by the terms of the Act (a burden illustrated by Indiana's continuing and thus far unsuccessful efforts to revise EPA's version of 1974 APC–3; *supra* at p.5 and n.4). And even if eventually successful, in the interim the Agency is substituting and enforcing its policy choice rather than the state's, and is doing so in blatant evasion of the Act's procedural safeguards discussed in Section III, *infra*.

[13] Under Indiana law a regulation not subjected to public notice, hearing, adoption by the Air Pollution Control Board, and, inter alia, signature of Governor and publication in Indiana Register is "void" and of no effect. IND. CODE §§ 4-22-2-2, 4-22-2-5 (1982).

including petitioner, the opportunity for judicial review of the merits of its version of the regulation. Since EPA is enforcing what it says is a *state* regulation, there is no general opportunity for federal judicial review with respect to the economic and technical feasibility of EPA's version of 1974 APC-3. *Union Electric*, 427 U.S. 246 (1976). Yet, because the State has never adopted EPA's version as a state regulation, a state court likely would not have jurisdiction to engage in such a review. Finally, EPA is enforcing a regulation that was never the subject of the administrative procedures expressly mandated by the Act.[14]

The Court of Appeals seemed to recognize the reality and gravity of these problems, but refused to consider them because, in its view, they involved challenges only to a specific exercise of a general authority of partial approval and therefore were, in this case, time-barred under Section 307(b) of the Act, 42 U.S.C. § 1857h-5(b) (1976). 682 F.2d at 634 n.12, 636-38 & n.16 (A–18, 22-26). However, the existence of these problems is clearly relevant to the general question whether the Administrator has any authority at all to proceed in this fashion. Moreover, the appellate court's interpretation of Section 307(b) is flawed for the identical reasons that its conclusion with respect to EPA's general authority is wrong.

In large part, the Court of Appeals affirmed EPA's claim of general authority to proceed in this fashion because: (1) approval of state-submitted revisions should be governed by the standards applicable to approvals of original SIPs, 682 F.2d at 632 (A14-15); and (2) the plain language of the Act

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[14] It is worthy of mention that because of exercise of the authority claimed, the verbatim text of what EPA contends is Indiana 1974 APC–3 is nowhere set forth in publications of either Indiana or federal regulations. This results in an independent violation of 42 U.S.C. § 7410(h), see 44 Fed. Reg. 4948-49(1979), and is hardly a desirable result since violations are subject to draconian civil, and criminal, penalties. 42 U.S.C. § 7413(b) and (c) (Supp. IV 1980).

allows EPA to approve "any portion of the original SIP". *Id.* at 633 (A-16). But the equally plain language of the Act shows the Administrator has no authority whatever to proceed as was done here.

With the sole exception of the situation described in Section II, *supra*, where the state voluntarily elects to submit for approval a revision to an existing and adequate SIP, the plain language of the statute *requires* the Administrator to begin proceedings to promulgate *federal* regulations pursuant to Section 110(c)(1) *whenever* he disapproves a state submission in whole or in part.[15] Thus, with that one exception, there is no situation when Administrator *disapproves* in which he is not under a simultaneous duty to proceed under Section 110(c)(1). This duty is flatly inconsistent with the authority claimed here to arrive at an adequate SIP and finalize the administrative process *solely* by exercise of the disapproval power—*i.e.*, by deleting portions of the state's submission.

This conclusion is compelled by the procedural scheme of the Act as well as by its express language. There are doubtless innumerable situations where the Administrator may properly approve a portion of a state's submission and disapprove the remainder. EPA may, for example, generally approve restrictions yet disapprove their application to particular metropolitan areas of a state; it may approve one

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[15] Section 110(c)(1) of the Act provides, *inter alia:*

"The Administrator *shall* . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—. . .

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

(Footnote continued on next page)

submitted emission limitation and disapprove another; it may approve such a limitation but disapprove its application to a particular industry. But the distinguishing feature of each of these "partial approvals" is that the administrative process is not finished because the state plan is, to the extent disapproved, inadequate to achieve national air quality standards. Hence, in each case, the Administrator has a mandatory duty pursuant to Section 110(c)(1) to propose federal regulations.

That there can never be a disapproval without a concomitant duty to proceed under Section 110(c)(1) is dictated both by the nature of the Administrator's authority to disapprove and by the role given the states by the Act.[16] EPA may disapprove a state submission only if, or to the extent that, it is inadequate to achieve national standards or otherwise fails to comply with Section 110(a)(2) of the Act. 42 U.S.C. § 7410(a)(2) (Supp. IV 1980). It has no authority to disapprove for any other reason. *Train*, 421 U.S. at 79. Thus, except where a pre-existing SIP has been approved and not subsequently found inadequate, *every* instance where EPA disapproves a state submission will be an instance where the state's SIP is inadequate. This

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> . . . . The Administrator *shall*, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section . . ."

42 U.S.C. § 7410(c)(1) (Supp. IV 1980) (emphasis added). Thus, except where there has been proposed a voluntary revision of a valid pre-existing SIP, there is no situation where Section 110(c)(1) does not mandate further procedures by the Administrator in the event he disapproves, in whole or in part, a state submission.

[16] The logic of the single exception is plainly dictated by the same considerations. When the state voluntarily elects to revise an adequate state plan, but the revision is disapproved, an adequate SIP remains in effect. It is quite understandable, then, why Congress excepted this one exercise of the disapproval power in imposing the otherwise general duty to proceed pursuant to Section 110(c)(1) whenever a state submission is disapproved.

explains Section 110(c)(1)'s requirement that the administrative process proceed. The Administrator *must* proceed to remedy the inadequacy by means of federal regulations. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980).[17]

The Court of Appeals stated that to require EPA to proceed pursuant to Section 110(c)(1), if it wished to enforce its version of 1974 APC-3 would be "unnecessarily duplicitous." 682 F.2d at 634 (A -18). That conclusion contains multiple errors. *First*, EPA has no authority to proceed under Section 110(c)(1) where, as here, it disapproves a revision of an existing adequate SIP (*see* Section II, *supra*). *Second*, even where Section 110(c)(1) is properly invoked, that section of the Act gives the state a second opportunity to develop a plan before EPA is authorized to impose the version it wishes, an opportunity denied under the administrative procedure used here. 42 U.S.C. § 7410(c)(1) (Supp. IV 1980).

Third, the two methods expressly provided by the Act for enacting enforceable emissions limitations, state submission and EPA approval on the one hand, and EPA promulgation pursuant to Section 110(c)(1) on the other, both require *public hearings* in the affected state on the proposed regulations. 42 U.S.C. §§ 7410(a)(2), 7410(a)(3), 7410(c)(1) (Supp. IV 1980). Aside from the fact that the statute requires such hearings, there is no basis for viewing them as "duplicitous." In addition to the information gathering function obviously served, the Act's requirement that EPA hold public hearings on proposed federal regulations *in the affected state*, 42 U.S.C. § 7410(c)(1) (Supp. IV 1980), indicates Congress' awareness that substantive changes in EPA's proposed regulations may result from the political dynamics of face to face confrontations with state and local public officials, affected local industries, and local environmental interests. The exercise of the authority claimed by the Administrator,

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[17] Further, proceeding under Section 110(c)(1) gives the state a second opportunity to correct the problem by means of its own choosing, 42 U.S.C. § 7410(c)(1) (Supp. IV 1980), an opportunity wholly abrogated by the authority claimed here to finalize the process merely by deleting portions of the state's submission.

and sanctioned by the Seventh Circuit, patently permits evasion of this statutory requirement.

Fourth, even if EPA follows notice and comment procedures for rulemaking in making its decision to approve or disapprove a state submission,[18] *that* decision process is in no way an adequate substitute for the rulemaking process required when EPA proposes to promulgate federal regulations pursuant to Section 110(c)(1).[19] In the approval/disapproval decision, EPA's authority and responsibility is limited to determining whether the state's submission meets the requirements of the Act. *Train*, 421 U.S. at 79. Its authority and responsibility in promulgating federal regulations pursuant to Section 110(c)(1) is much broader since it must then also make decisions with respect to the appropriate mix of limitations.[20] And because the essential focus and character

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[18] It did not in this case. No notice of any intent to disapprove 1974 APC-3's 15 minute exception while "approving" the remainder was published prior to EPA's order. *Supra* at p. 5. Following the decision in *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162 (6th Cir. 1973), EPA indicated that it would follow general Administrative Procedure Act ("APA") requirements for informal rulemaking prior to taking "approval/disapproval actions on SIP actions submitted by states ...." *Revisions to State Implementation Plans—Procedures for Approval-Disapproval Actions*, OAQPS No. 1.2-005A, EPA, October, 1975 at 8.

[19] Prior to the 1977 amendments to the Act, EPA was required to follow APA Section 553 rulemaking procedures, 5 U.S.C. § 553 (1976), when it promulgated federal regulations to replace or supplement a deficient SIP. *See, e.g., Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated on other grounds sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977). Under the Act as now amended, the Agency must employ rulemaking procedures far more elaborate than those required for rulemaking under the APA, *see* Section 307(d), 42 U.S.C. § 7607(d)(Supp. IV 1980), all of which may be evaded by exercise of the authority claimed here and upheld below.

[20] This Court has left open the question whether EPA must consider economic and technical feasibility issues when it promulgates federal regulations pursuant to Section 110(c)(1). *Union Electric*, 427 U.S. at 261 n.7. Several lower federal courts have

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of the decision making process is altered, requiring further rulemaking proceedings under Section 110(c)(1) is far from "duplicitous" as held by the appellate court—Congress deemed it essential to the end of careful and reasoned decision making. 42 U.S.C. §§ 7410(c)(1), 7607(d) (Supp. IV 1980).

Finally, the Court of Appeals erred in part in its analysis of EPA's contention that review of the issues in this case is time barred by Section 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1) (1976). It correctly held that Section § 307(b)(1)'s requirement for expeditious review of EPA action in approving submissions does not preclude a challenge questioning EPA's general "power to partially approve a revision . . . ." 682 F.2d at 636, n.17 (A-23). That issue on the merits is identical to the issue of Section 307(b)(1)'s application. Section 307(b)(1) governs judicial review of EPA approvals. Therefore, the question of the Administrator's general authority is the same as the question whether what he did here is an "approval" within the meaning of Section 307(b). 42 U.S.C. § 1857h-5(b) (1976).[21] However, once the Court of Appeals determined that EPA had general statutory authority partially to approve revisions, it viewed many of

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indicated that it must. *Bunker Hill Co.* v. *EPA*, 572 F.2d 1286, 1294 (9th Cir., 1977); *Kennecott Copper Co. v. Train*, 526 F.2d 1149 (9th Cir. 1975) *cert. den.* 425 U.S. 935 (1976); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974). However this Court ultimately resolves that issue, it is obvious that in a Section 110(c)(1) proceeding EPA must to some extent step into the shoes of the defaulting state, and must consider and resolve many issues irrelevant to its prior decision to disapprove the state's submission.

[21] Although not cited by the Court of Appeals, its conclusion in this respect is squarely supported by this Court's decision in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), holding Section 307(b)(2), 42 U.S.C. § 1857h-5(b) (1976), did not bar the Court from deciding the question whether "the regulation which the defendant is alleged to have violated is on its face an 'emission standard' within the broad limits of the congressional meaning of

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PSI's arguments as challenging only the propriety of the exercise of that authority in the circumstances, consideration of which was time barred by Section 307(b)(1).

Section 307(b)(1) as in effect in 1975 permitted review only of EPA action "in approving" state submissions. 42 U.S.C. § 1857h-5(b)(1)(1976). Courts interpreting that provision at the time held that EPA action approving in part and disapproving in part a state submission was not final and hence not reviewable at that point. *Utah International, Inc.* v. *EPA*, 478 F.2d 126 (10th Cir. 1973); *Anaconda Company* v. *Ruckelshaus*, 482 F.2d 1301, 1304-5 (10th Cir. 1973). *See also, Natural Resources Defense Council, Inc.* v. *EPA*, 481 F.2d 116,121 (10th Cir., 1973). The Seventh Circuit purported to distinguish *Utah International's* finality holding on the grounds that there, but not here, the Administrator had proposed to promulgate federal regulations pursuant to Section 110(c)(1), and hence the administrative process was not completed.[22] In so distinguishing *Utah International*, the Court of Appeals simply repeated its error with respect to the question on the merits. Under the Clean Air Act properly construed, except where there is an adequate pre-existing SIP, EPA disapproval of a state submission is *never* the end of the administrative process because Section 110(c)(1) always mandates further administrative action.

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that term." *Id.* at 285. *See also, id.* at 294 n.1 (Stevens, J., dissenting): Section 307(b) "applies only if the Administrator's action could have been reviewed in the Court of Appeals for the District of Columbia Circuit; and review was not available there unless the Administrator's 'action' was the promulgation of an 'emission standard' within the meaning of 307(b)."

[22] The Court relied upon *Big Rivers Electric Corp.* v. *EPA*, 523 F.2d16, 18 (6th Cir., 1975). However, as noted *supra* at p.7 n.8, and by the Court of Appeals, 682 F.2d at 634 n.11, EPA's authority to finalize the administrative process by disapproving portions of the state's submission was not challenged in that case and was not addressed by that court.

Whether evaluated in terms of its express language, the logic of the procedural scheme it establishes, or the central policies it reflects, the Act contemplates *no* situation where EPA can establish by disapproval standing alone either an adequate SIP or, necessarily, the finality required to invoke timely review under the 1975 version of Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1976).[23]

CONCLUSION

For the foregoing reasons, a Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be granted, and the judgment of that Court entered June 25, 1982, should be reversed.

Dated: September 23, 1982.

Respectfully submitted,

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[23] In 1977, Congress revised Section 307(b)(1), *inter alia*, to provide for judicial review of EPA actions *disapproving* state-submissions as well. Section 307(b)(1), 42 U.S.C. § 7607(b)(1) (Supp.IV 1980). That amendment affects only the question of when the administrative process is sufficiently final for purposes of judicial review, and in no manner alters the EPA's general authority and duties with respect to the issues presented by this Petition.